IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 20TH JUNE 2007 / 30TH JYAISHTA 1929

MFA.No. 370 of 1993()

APPEAL NO.15/1990 DT. 3.12.92 FOREIGN EXCHANGE REGULATION APPELLATE BOARD, NEW DELHI.

APPELLANT:

DR.T.C.M., PILLAY, "USHUS", TEMPLE ROAD,
SASTHAMANGALAM, TRIVANDRUM 695 010

BY ADV. DR.T.C.M.PILLAY [PARTY]

RESPONDENT:

DIRECTOR OF ENFORCEMENT,
ENFORCEMENT DIRECTORATE,
6TH FLOOR, LOKNAYAK BHAVAN,
KHAN MARKET, NEW DELHI.

BY ADV. SRI.TOMY SEBASTIAN

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 20/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. KOSHY and K.P.BALACHANDRAN, JJ.

M.F.A. No. 370 of 1993

Dated this the 20th day of June, 2007

Judgment

Koshy, J.

Order of the Foreign Exchange Regulation Appellate Board is challenged in this appeal. Appellant was imposed with penalty on five counts by the Additional Director of Enforcement for the contravention of the Foreign Exchange Regulation Act, 1973 (in short 'the Act'). When the appeal was posted for hearing it was reported that advocate for the appellant passed away. Therefore, notice was sent to the appellant. A letter dated June 19, 2005 was received from him stating that he is very old, passed the age of 88, that he had undergone two heart surgeries and that now also he is under treatment. Hence, appeal may be considered on merit. Another letter was received on 27th February, 2007 stating that he is aged 90 and his thinking capacity is impaired and his absence be excused.

2. Appellant, an Indian citizen, was working as Professor of Metallurgical Engineering in the Karnataka Regional Engineering College. Before his retirement, he

worked in the United States of America from 1958 to 1962 and from 1964 to 1971. He came back to India and retired from service in 1977. Appellant's son and daughter are working in the United States of America. Later, in 1982, appellant went for heart operation in USA. On his return, his children gave him US $ 1000. After spending some money, he had US $ 906 with him. First charge is relating to the above. That amount was searched and found out. Since the authorities found that as per the Rules existing at that time, he ought to have exchanged the same with Indian currency within three months. Rs.1,000/- was charged for the technical violation. We see no ground to interfere in the above penalty imposed on the appellant.

3. Second charge was that he purchased a colour television and VCR from one Sharafuddin and Darmakumar who were non-resident Indians. According to the appellant, he was not aware that they are non-resident Indians though Indian nationals. They were working in Kerala and he purchased it bona fide and he was not aware they are having N.R.I. status. He was imposed with a penalty of Rs.2,500/- on that count. It is true that if any payment is made to a non-resident

Indian without permission, section 9 (1) (a) is attracted. Here, payment was made to an N.R.I. though without knowing that recipient of money was an N.R.I. Amount was given for purchasing a VCR and television. Transaction was bona fide. We are of the opinion that imposition of penalty of Rs.2,500/- is on the high side even though there may be a technical violation of section 9 (1) (a) of the Act. In the above circumstances, we reduce the penalty to Rs.1,000/-.

4. Next charge was that he failed to repatriate a sum of US $ 45685.62 being the sums deposited in his F.C. accounts with the Continental Federal Savings, Ohio and the amounts of the sale proceeds of his properties in the USA into India in contravention of the provisions of section 14 of the Foreign Exchange Regulation Act, 1973 read with the relevant notifications issued thereunder. It is seen from the records of the case that the accounts with Continental, a Federal Savings Division of Dollar Bank was in the joint name of Dr.Pillai and Mr.Sasikumar Pillai. According to Dr.Pillai US $ 200 was his pension. That was being deposited. According to the appellant, his son was also employed in US. According to him, there

is no question of any repatriation as he used the pension amount he received after he came back to India. However, explanation for US $ 1200 was not accepted and Rs.25,000/- was imposed as penalty. The Additional Director of Enforcement of the Appellate Board found that he received pension only for 73 months instead of 72 months as pension period. The appellant had tendered his passport to the adjudicating officer to show that he was in India only for 48.5 months. Under the Foreign Exchange Act and Rules, a person is entitled to the status of non-resident for a period of 90 days after arrival. Hence, pension to be repatriated in any view can be of 39.5 months at the rate of US $ 200 whereas the appellant had repatriated US $ 11,400.14 and had an excess of $ 3500 and which was explained under five different heads to the Appellate Board. We are of the opinion that Appellate Board ought to have been found that only the amount left with the appellant in USA was the pension amount deposited in Continental Federal Savings, Clevland. This account is a joint account with his son. The Appellate Board has not taken into consideration the amounts spent in USA out of it during his long stay when he was a green card holder. Amounts

spent for open heart bye-pass surgery, air tickets to and fro for two persons were also not taken into consideration. The appellant is liable to repatriate only the balance amount after defraying all the above expenses. Section 50 of the Act, as it stood on the relevant period, reads as follows:

> "50. Penalty:- If any person contravenes any of the provisions of this Act (other than section 13, clause (a) of sub-section (1) of section 18 and clause (a) of sub-section (1) of section 19 or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer)."

In the circumstances of the case, we reduce the penalty to Rs.5,000/- on the facts of the case.

5. With regard to imposition of penalty of Rs.3,000/- for failing to repatriate US $ 1800, we see no

ground to interfere in the above.

6. Last charge under section 19 (1) (e) of the Act is regarding the transfer of 69 GEC shares to the value of US $ 690. Section 19 (1) (e) reads as follows:

> "19. Regulation of export and transfer of securities:- (1) Notwithstanding anything contained in section 8 of the Companies Act, 1956 (1 of 1956), no person shall, except with the general or special permission of the Reserve Bank, --
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> xx xx xx xx
>
> (e) acquire, hold or dispose of any foreign security."

While the appellant was in U.S.A., he was employed under GEC and the company gave those shares. That was transferred to his son and disposal of those shares to his son violates the section 19. We see no ground to confirm the charges as no offence is committed. Son is his legal heir. Actually, the shares were transferred in 1971 itself when he was working abroad and he has not committed any offence under the Foreign Exchange Regulation Act, 1973. The above imposition of Rs.2,500/- is set aside. In the above circumstances, total penalty payable is only Rs.10,000/-. Hence, the appeal is allowed partly. If penalty is already realised from

him, after deducting Rs.10,000/- balance shall be refunded to him. If it is to be received, demand can be made only for Rs.10,000/-. On the facts of the case, respondent is directed to send a copy of this judgment to the appellant for information. Appeal allowed partly.

J.B.KOSHY
JUDGE

K.P.BALACHANDRAN
JUDGE

vaa

J.B. KOSHY AND
K.P.BALACHANDRAN, JJ.

M.F.A.NO.370/93

JUDGMENT

Dated:20th June, 2007